Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–177 OF 2001
BALIA YUSOFF JC
1 DECEMBER 2004

Land Law — Housing developers — Damages for late delivery — Vacant possession — Construction of sale and purchase agreement — Whether vacant possession granted only upon issuance of certificate of fitness — Developer's letter purportedly giving vacant possession without issue of certificate of fitness for occupation, whether effective — Application of force majuere clause

The respondent ('the purchaser') entered into a sale and purchase agreement ('the agreement') for a shop house with the appellant ('the developer') on 20 November 1992. Clause 23 of the agreement stated that the developer shall deliver vacant possession of the property within 30 months from the date of the agreement (ie on or before 19 May 1995) failing which the purchaser shall be entitled to liquidated damages. Clause 3.2 of the agreement provides for the manner of payment of the purchase price in accordance with the Sixth Schedule of the agreement, which provided that the last 5% of the payment amounting to RM9,900 shall be paid by the purchaser upon the issuance of certificate of fitness for occupation. On 16 May 1995 the purchaser received a letter from the developer stating that the shop house was ready for delivery of vacant possession although the certificate of fitness for occupation had yet to be issued. A final certificate of fitness for occupation was only issued on 5 May 1998. On 8 July 1996 the purchaser was handed the keys to the shop house.

The purchaser claimed that pursuant to cl 23 of the agreement the developer had failed to deliver vacant possession on or before 19 May 1995 but only did so on 8 July 1996 when the keys to the shop house were handed to them. The purchaser therefore claimed for liquidated damages for late delivery calculated on the basis of a delay of 412 days from 19 May 1995.

The developer contended that vacant possession was given to the purchaser on 16 May 1995 even though there was yet to issue a certificate of fitness for occupation. It was submitted that the developer had done everything possible to obtain the certificate of fitness for occupation and they are therefore not responsible for any delay on the part of the authority in issuing the same. Such failure or delay on the part of the authority was beyond their control and therefore they were protected under cl 24 of the agreement on *force majuere*. The sessions judge gave judgment for the purchaser. The developer appealed.

The issue revolved solely on the interpretation of cll 23, 3.2 and the Sixth Schedule of the agreement in order to determine when vacant possession was actually granted to the purchaser.

Held, dismissing the appeal with costs:

(1) All the provisions in cll 3.2, 23 and the Sixth Schedule of the agreement must be construed together and as a whole. In construing the agreement, cl 23 must be read together with the Sixth Schedule of the agreement (see para 8).

(2) It was the intention of the parties that the last payment of RM9,900 being the last 5% of the purchase price is payable and subject to the issuance of a certificate of fitness for occupation. This clearly envisaged that the developer could only deliver vacant possession to the purchaser after a certificate of fitness for occupation has been issued. A temporary certificate of fitness for occupation was issued on 24 June 1996, 3December 1996, 17 June 1997 and the final one was issued on 5 May 1998. On this fact, the letter dated 16 May 1995 from the developer purportedly giving vacant possession to the purchaser was of no effect and had no value because no certificate of fitness for occupation had been issued yet at that point of time. Thus the effective date of the delivery of vacant possession was 8 July 1996 when the keys to the shop house were delivered to the purchaser after the issuance of a certificate of fitness for occupation on 24 June 1996 (see para 10).

(3) There was no evidence that the developer's non performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence The letters applying for the issue of certificate of fitness for occupation tendered in court were issued just about two months before the issue of the letter dated 16 May 1995 purportedly giving vacant possession to the purchaser. In the circumstances, the developer had failed to prove that the said cl 24 had availed them (see paras 12 and 13).

(4) There was no sufficient reason to justify this court to interfere with the decision of the sessions judge. It had not been demonstrated before this court that the trial judge had misdirected himself which would justify intervention (see para 14).

[**Bahasa Malaysia summary**

Responden ('pembeli') telah memasuki satu perjanjian jual beli sebuah rumah kedai dengan defendan ('pemaju') pada 20 November 1992. Fasal 23 perjanjian tersebut menyatakan bahawa pemaju hendaklah melakukan penyerahan harta milik kosong harta tersebut dalam masa 30 bulan dari tarikh perjanjian (iaitu sebelum atau pada 19 Mei 1995). Kegagalan untuk membuat demikian akan menyebabkan pemaju bertanggungjawab atas jumlah ganti rugi tertentu. Fasal 3.2 daripada perjanjian memberi cara pembayaran dari harga pembelian menurut jadual keenam perjanjian, yang menyatakan bahawa 5% terakhir daripada bayaran berjumlah sebanyak RM9,900 harus dibayar oleh pembeli apabila

menerima perakuan kesesuaian untuk didiami. Pada 16 Mei 1995 pembeli telah menerima sepucuk surat dari pemaju yang menyatakan bahawa rumah kedai tersebut sedia untuk penyerahan hak milik kosong walaupun perakuan kesesuaian hanya dikeluarkan pada 5 Mei 1998. Pada 8 Julai 1996 pembeli diberi kunci kepada rumah kedai tersebut.

Pembeli telah menuntut atas fasal 2.3 daripada perjanjian bahawa pemaju gagal memberi hak milik kosong sebelum atau pada 19 Mei 1995 dan hanya berbuat demikian pada 8 Julai 1996. Oleh itu pembeli menuntut ganti rugi jumlah tertentu yang dikira berdasarkan kelewatan sebanyak 412 hari dari tarikh 19 Mei 1995.

Pemaju tidak bersetuju dan menyatakan bahawa hak milik kosong telah diberi kepada pembeli pada 16 Mei 1995 walaupun belum memberi perakuan kesesuaian untuk mendiami. Ia dihujahkan bahawa pihak pemaju telah melakukan semua yang patut dilakukan untuk mendapatkan perakuan kesesuaian untuk mendiami dan oleh itu tidak bertanggungjawab ke atas kelewatan pihak penguasa yang mengeluarkan perakuan tersebut. Kegagalan atau kelewatan yang berlaku adalah di luar kuasa pemaju dan oleh itu dilindungi bawah fasal 24 dari perjanjian atas *force majuere*. Mahkamah memberi keputusan memihak kepada pembeli.

Diputuskan, menolak rayuan:

(1) Kesemua peruntukan dalam fasal 3.2, 23 dan jadual keenam daripada persetujuan mestilah ditafsirkan bersama dan sebagai satu. Dalam mentafsirkan fasal-fasal itu, ia mestilah dibaca sekali dengan jadual keenam dari perjanjian (lihat perenggan 8).

(2) Adalah niat parti-parti supaya bayaran terakhir RM9,900 iaitu 5 % terakhir dari harga belian mesti dibayar dan ia tertakluk kepada pengeluaran perakuan kesesuaian untuk mendiami. Jelas dijangkakan bahawa pemaju hanya boleh memberi hak milik kosong kepada pembeli selepas perakuan kesesuaian mendiami telah dikeluarkan. Satu sijil sementara telah dikeluarkan pada 24 Jun 1996, 3 Disember 1996, 17 Jun 1997 dan 16 Mei 1998. Atas fakta ini surat yang bertarikh 16 Mei 1995 daripada pemaju bertujuan memberi hak milik kosong kepada pembeli tidak memberi kesan dan tidak berharga kerana tiada perakuan kesesuaian untuk mendiami dikeluarkan pada masa tersebut. Oleh itu tarikh berkuat kuasa penyerahan hak milik kosong adalah 8 Julai 1996 iaitu bila kunci ke rumah kedai di hantar kepada pembeli selepas pengeluaran perakuan kesesuaian untuk mendiami pada 24 Jun 1996 (lihat perenggan 10).

(2) Tiada bukti menunjukkan yang pihak pemaju tidak membuat apa-apa kerana situasi berada di luar kawalannya dan tiada langkah yang berpatutan diambil untuk mengelak atau mengurangkan akibat kes

tersebut. Surat meminta penyerahan perakuan kesesuaian untuk mendiami yang diserah kepada mahkamah hanya dihantar dua bulan sebelum surat bertarikh 16 Mei 1995 bertujuan memberi hak milik kosong kepada pembeli. Dalam keadaan tersebut pihak pemaju gagal mengesahkan yang fasal 24 telah menyokong mereka (lihat perenggan-perenggan 12 dan 13).

(3) Tiada sebab yang mencukupi untuk mahkamah campur tangan dengan keputusan hakim sesyen. Ia tidak jelaskan kepada mahkamah bahawa hakim pembicaraan telah menyalah arahkan dirinya sehingga menjustifikasikan mahkamah untuk masuk campur (lihat perenggan 14).]

Notes

For cases on terms in sale and purchase of property, see 3(2) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 4412–4414.

For cases on delivery of vacant possession, see 8(1) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 2602–2608.

For housing developers, see 8 *Halsbury's Laws of Malaysia*, paras [150.651]–[150.691].

Cases referred to:

Bandar Raya Development Bhd v Ang Yoke Lian Construction Sdn Bhd [1993] 1 AMR 8 (folld)

Ford v Beech (1948) 11 QB 852 (refd)

Jagathesan v Linggi Plantations Ltd [1969] 2 MLJ 235 (refd)

Powell & wife v Streatham Manor Nursing Home [1935] AC 243 (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)

Trollope Colls Ltd [1973] 2 All ER 262 (refd)

Arjan Singh (Arjan Singh & Co) for the respondent.

Chung Chee Yien (Yeap & Yong) for the appelant.

Balia Yusoff JC:

[1] This is an appeal by a developer of a housing project against the decision of the sessions court Ipoh giving judgment to the respondent for late delivery of a shop house. The parties entered into a sale and purchase agreement dated 20 November 1992 whereby the appellant ('the developer') agreed to sell and the respondent ('the purchaser') agreed to buy a shop house for a consideration of RM198,000. According to cl 23 of the said sale and purchase agreement, the developer shall deliver vacant possession of the property within 30 months from the date of the agreement which means either on or before 19 May 1995 failing which the purchaser shall be entitled to liquidated damages at the rate of 12% per annum of the total amount of the purchase

price paid by the purchaser until actual delivery of vacant possession of the said property. Clause 3.2 of the agreement provides for the manner of payment of the purchase price which in turn refers to the Sixth Schedule of the said sale and purchase agreement. According to the Schedule of Payments as stated in the said Sixth Schedule, the last 5% of the payment amounting to RM9,900 shall be paid by the purchaser upon the issuance of certificate of fitness for occupation.

[2] On 16 May 1995 the purchaser received a letter from the developer stating that the shop house was ready for delivery of vacant possession. It was also established from the agreed facts that at that point of time, the certificate of fitness for occupation had yet to be issued. A temporary certificate of fitness for occupation was issued on 24 June 1996, 3 December 1996 and 17 June 1997. A final certificate of fitness for occupation was only issued on 5 May 1998. On 8 July 1996 the purchaser was handed over the keys to the shop house after settling the various charges and overdue interest owed to the developer.

[3] The purchaser claims that pursuant to cl 23 of the said sale and purchase agreement the developer has failed to deliver vacant possession on or before 19 May 1995 but only did so on 8 July 1996 when the keys to the said shop house were handed over to them. The purchaser therefore claims for liquidated damages in the sum of RM26,819.50 for late delivery calculated on the basis of a delay of 412 days from 19 May 1995.

[4] The hearing of the purchaser's claim before the session court was held without calling any witnesses. Both parties agreed the matter be decided by the learned sessions judge by way of the agreed facts as stated above. The issue before the court as correctly pointed out by the learned sessions judge revolves solely on the question of interpretation of cll 23, 3.2 and the Sixth Schedule of the sale and purchase agreement dated 20 November 1992 in order to determine when vacant possession was actually granted to the purchaser.

[5] It is the contention of the developer that vacant possession was given to the purchaser on 16 May 1995 and the purchaser had failed to take vacant possession within seven days as requested in the letter dated the same. Clause 23 has been complied with and there is no basis to read into that clause the issue of certificate of fitness for occupation. It is further contended that the developer had done everything possible to obtain the certificate of fitness for occupation and they are therefore not responsible for any delay on the part of the authority in issuing the same. It is in the developer's contention that such failure or delay on the part of the authority is beyond their control and this seeks the aid of cl 24 of the sale and purchase agreement on *force majuere*. Clause 23 of the sale and purchase agreement reads as follows:

Delivery of Vacant Possession Within 30 Months

Provided the Purchaser shall have paid the Purchase Price in full and provided the Purchaser shall have faithfully performed all the terms and conditions set out in this Agreement the Developer shall deliver vacant possession of the Property free from all encumbrances to the Purchaser within thirty (30) months of this Agreement (hereinafter referred to as 'the Delivery Period'), failing which the Purchaser shall be entitled only to liquidated damages at the rate of 12% per annum or such other rate as may be specified by the Developer from time to time of the total amount of the Purchase Price paid by the Purchaser until actual delivery of vacant possession of the Property. Apart from the above rights the Purchaser shall not have any other rights against the Developer regardless of whether or not the Purchaser shall have suffered damages of whatsoever kind. Vacant possession of the Property shall be delivered to the Purchaser by way of the Developer notifying the Purchaser in writing to take the same within 7 days of the receipt of the notice and vacant possession of the Property shall be deemed to have been taken by the Purchaser upon the expiry of the said 7 days regardless of whether or not the Purchaser shall have physically taken the same or entered into occupation of the Property.

[6] Clause 3.2 reads:

Manner of Payment of Purchase Price

The Purchase Price shall be paid by the Purchaser to the Developer in the following manner:

(a) simultaneously with the execution of this Agreement the Purchaser shall pay a sum representing 10% of the Purchase Price by way of deposit and earnest money (hereinafter referred to as 'the Deposit') to the Developer to be dealt with by the Developer as hereinafter stated; and

(b) the balance 90% of the Purchase Price shall be paid by the Purchaser to the Developer in accordance with the schedule of payment set out in the Sixth Schedule.

[7] And the Sixth Schedule of the same provides:

SIXTH SCHEDULE SHEDULE OF PAYMENTS			
Installments Payable		%	Amount
1	Immediately upon the signing of this Agreement	10	RM 19,800.00
2	Within fourteen [14] days after receipt by the Purchaser of the Developer's written notice of the completion of:		

	(a)	The foundation and footing works	15	RM 29,700.00
	(b)	The reinforced concrete framework of the building	20	RM 39,600.00
	(c)	the walls of the said Building with door and window frames placed in position	15	RM29,700.00
	(d)	the roofing, electrical wiring and plumbing (without fittings) of the Building	15	RM29,700.00
	(e)	The internal and external plastering of the Building	10	RM19,800.00
	(f)	the roads, drains and sewerage works serving the Building	10	RM19,800.00
3	Upon issue of Certificate of Fitness for Occupation		5	RM9,900.00
			100	RM 198,000.00

[8] It is an established principle that in construing an agreement, the various clauses in the agreement must be considered as a whole and not singly or independently of one another in order to construe the true intention of the parties to the same. Further the court must give an interpretation according to the grammatical and ordinary sense of the words used in the agreement. (*Bandar Raya Development Bhd v Ang Yoke Lian Construction Sdn Bhd* [1993] 1 AMR 8). Adopting the said principle, it is my considered view that all the provisions in cll 3.2, 23 and the Sixth Schedule of the sale and purchase agreement must be construed together and as a whole. Again in *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 235 Ong Hock Thye CJ states:

> The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that consideration which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. (See *Ford v Beech* (1948) 11 QB 852.)

[9] I must further add that in the interpretation of the term of a private contract the judge is not to impose new terms or rewrite a contract and his function is only to express the intention of the parties to the contract. (see *Trollope Colls Ltd* [1973] 2 All ER 262).

[10] In construing the agreement, the learned sessions judge has adopted the above said principle and has read cl 23 together with the Sixth Schedule of the agreement and came to the conclusion that it was the intention of the parties that the last payment of RM9,900 being the last 5% of the purchase price is payable and subject to the issuance of a certificate of fitness for occupation. Clause 23 of the sale and purchase agreement clearly provides that: 'Provided the purchaser shall have paid the purchase price in full …' and the Sixth Schedule provides that the last 5% is payable 'upon the issuance of certificate of fitness for occupation' clearly envisages that the developer can only deliver vacant possession to the purchaser after a certificate of fitness for occupation has been issued. Atemporary certificate of fitness for occupation was issued on 24 June 1996, 3December 1996, 17 June 1997 and the final one was issued on 5 May 1998. On this fact, the letter dated 16 May 1995 from the developer purportedly giving vacant possession to the purchaser is of no effect and has no value because no certificate of fitness for occupation had been issued yet at that point of time. Thus the effective date of the delivery of vacant possession was 8 July 1996 when the keys to the shop house were delivered to the purchaser after the issuance of a certificate of fitness for occupation on 24 June 1996.

[11] On the issue of *force majuere*, learned counsel for the developer contends that the failure of the developer to get the necessary approvals for the authorities is not within their control and as such the provisions of cl 24 of the sale and purchase agreement applies. Clause 24 reads:

> The Developer shall not be liable to the Purchaser for any failure to fulfill any terms of the agreement if such fulfillment is delayed, hindered or prevented by force majuere including but not limited to Acts of God strikes lockouts riots civil commotion acts of war or failure to obtain any necessary approval of any local or other appropriate authority or any other circumstances of whatsoever nature beyond the control of the Developer.

[12] It is trite that a party relying upon a *force majuere* clause must prove the facts bringing the case within the clause. He must therefore prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed, as that case may be from performing the contract by reason of the event. He must further prove that his non performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence (Chitty on Contracts (28th Edition) Vol 1 at 273-274).

[13] There is no evidence before the trial judge to make a finding on this issue except that there were letters addressed to the Datuk Bandar Ipoh dated

8 March 1995 (pp 85-87 of the Appeal Record) applying for the issue of certificate of fitness for occupation. These letters were issued just about two months before the issue of the letter dated 16 May 1995 purportedly giving vacant possession to the purchaser. In the circumstances, the developer has failed to prove that the said cl 24 has availed them. Counsel's submission from the bar table is insufficient to discharge the burden placed on them.

[14] Having perused the record of appeal and considered the submissions of both counsel for the appellant and respondent, I do not find sufficient reason to justify this court to interfere with the decision of the learned sessions judge. It has not been demonstrated before this court that the trial judge has misdirected himself which would justify intervention. In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 it has been stated:

[15] It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[16] In *Powell & wife v Streatham Manor Nursing Hom*e [1935] AC 243 at 249, the English Court of Appeal states:

> On an appeal against a judgment after a trial before a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way.

[17] Again, it has also been said that it would certainly be an abdication of an appellate court's proper function and responsibility if it does not intervene and set right decisions of trial courts that are plainly wrong or unjust. I do not find that such is the case in the instant appeal and accordingly this appeal is dismissed with costs.

Appeal dismissed

Reported by Loo Lai Mee